KSM Industries, Inc. *and* United Paperworkers International Union Local 7779, AFL-CIO-CLC. Cases 30-CA-13762, 30-CA-14008, and 30-CA-14101

## September 28, 2001 DECISION AND ORDER BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On April 30, 1998, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed cross-exceptions and supporting briefs. All parties filed answering briefs, and the Respondent and the Charging Party filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the exceptions in light of the record and briefs and has decided to affirm the judge's rulings, findings, <sup>1</sup> and conclusions, as modified, and to adopt the recommended Order, as modified and set forth in full below.<sup>2</sup>

The complaint in this case alleges various violations of Section 8(a)(1), (3), and (5) of the Act. The judge found some of the alleged violations and dismissed others. Thus, the judge found that the Respondent violated Section 8(a)(1) by threatening striking employees with a loss of jobs and closure of the facility because of their union activities. He also found that the Respondent violated Section 8(a)(5) by refusing to process a grievance and to provide the Union with information it requested in connection therewith. And he found that the Respondent further violated Section 8(a)(5) by insisting on a provision that replacement workers hired during the strike would not be displaced by returning strikers. Finally, he found that the Respondent violated Section 8(a)(3) by failing and refusing to reinstate the strikers upon their unconditional offer to return to work. On the other hand, he found that the Respondent did not violate the Act by terminating striker Randy Schultz and by withdrawing its wage offer after the strike. We adopt all of the foregoing

findings, with certain modifications and as further explained below. However, we reverse the judge's additional finding that the Respondent did not violate the Act by asking strikers what they were doing for a living.

## Alleged 8(a)(1) Statements

The record establishes that soon after the employees commenced an economic strike on January 3, 1997, the Respondent's operations manager, Bill James, began going out to the picket line to observe the strikers. James taunted the strikers on numerous occasions, and the judge found that he unlawfully threatened them with a loss of jobs and plant closure when he told strikers variously that they would "never work in this kind of work again," "not get their jobs back," "never see the inside of the doors or the building no matter what," "never return to work," and that they were "out" and "not getting back in," and "would not come back." We agree with these findings.

The judge, however, excused James' telling strikers "[t]hese people in here have jobs" and asking "[w]hat are you doing for a livelihood?" The judge found that these remarks were not threatening because, during the strike, James passed along information to the strikers about companies that were hiring and received inquiries from other companies where strikers sought interim employment. We disagree.

The Board has long held that the standard to be used in analyzing statements alleged to violate Section 8(a)(1) is whether they have a reasonable tendency to coerce employees in the exercise of their Section 7 rights. Intent is immaterial. *Concepts & Designs*, 318 NLRB 948, 954, 955 (1995); *Puritech Industries*, 246 NLRB 618, 622–623 (1979). The Board considers the totality of circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce. *Concepts & Designs*, supra.

Applying these principles here, it is plain that James' comment and question were simply another way of telling the strikers they were out of a job. Against the backdrop of other, more explicit threats by James to the strikers, his rhetorical questioning had a reasonable tendency to be coercive. Shen Automotive Dealership Group, 321 NLRB 586, 590 (1996) (veiled threat); Oster Specialty Products, 315 NLRB 67, 71 (1994). Further, in the face of repeated reminders that striking employees would never see the inside of the Respondent's facility or work in the industry again, the coercive effect of James' question is not diminished or excused by an innocuous purpose. Electronic Data Systems Corp., 305 NLRB 219, 237–238 (1991) (immaterial that supervisor may have intended a friendly warning to employees); Puritech In-

<sup>&</sup>lt;sup>1</sup> Counsel for the General Counsel, the Respondent, and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>&</sup>lt;sup>2</sup> We will modify the judge's order to clarify the reinstatement rights of strikers and to conform to our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

dustries, supra; Jacobs Packing Co., 187 NLRB 935 (1971).

That one employee testified that James conversed with some strikers about outside employment does not erase the reasonably threatening effect the comment had on other employees. Indeed, if James were only interested in the welfare of the striking employees, there was no need to preface the question with a reference to replacements having jobs.

In addition, the fact that it was James who was providing references to employers with whom the strikers were seeking interim employment would seem to enhance, rather than diminish, the coercive nature of his inquiry. After all, James also told these employees that they would "never work in this kind of work again," a remark which would indicate to a reasonable striker that James might not provide the most glowing recommendation to a prospective employer. In this context, his inquiry about whether strikers had other jobs would have the reasonable tendency to be all the more threatening.

For these reasons, we find that James' rhetorical questioning violated Section 8(a)(1) of the Act.

## The Discharge of Striker Randy Schultz

We agree with the judge's finding that the Respondent did not violate Section 8(a)(3) by terminating striker Randy Schultz for assaulting James on the picket line.<sup>3</sup> Because Schultz was the only striker to physically touch a manager, we reject the Union's argument that Schultz was treated disparately. We also find distinguishable *E. I. du Pont* & Co., 263 NLRB 159 (1982), cited by the Union. In that case, the Board reinstated a striker who was discharged for pushing a manager away in self-defense. Here, although James unlawfully taunted employees with threats of job loss and plant closure, there is no evidence of direct provocation by him.

#### Denial of Reinstatement Rights of Strikers

We also agree with the judge that the Respondent unlawfully insisted on a proposal that returning strikers would not displace replacement workers and then unlawfully refused to reinstate the strikers upon their unconditional offer to return to work. In adopting the judge's findings, however, we find that the employees' economic strike which began on January 3, 1997, was converted to an unfair labor practice strike on March 19 rather than

March 12, 1997, as found by the judge. Contrary to the judge's finding, March 19 was the date of the Respondent's first unfair labor practice: the refusal to process a grievance concerning the discharge of Schultz and to provide the Union with related information that it requested. Thus, it was from that date forward that the strike was an unfair labor practice strike. As a result, Respondent violated Section 8(a)(5) by maintaining its proposal, on and after March 19, to make all of the replacements permanent. Additionally, the Respondent violated Section 8(a)(3) by refusing to reinstate strikers who had not been permanently replaced as of March 19.<sup>4</sup>

## Unilateral Implementation of Health Insurance Proposal

We agree with the judge that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing its medical and dental insurance proposal on April 11, 1997 (retroactive to April 1), after reaching impasse.<sup>5</sup> We find that the judge properly applied our decision in *McClatchy Newspapers*, 321 NLRB 1386, 1388 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997). There, the Board recognized a narrow exception to the implementation-upon-impasse rules.

The employer in *McClatchy* had insisted to impasse on, and subsequently implemented, a proposal reserving sole discretion on merit wage increases, including the timing, amount, and criteria for receiving them. In reviewing the employer's proposal, the Board acknowledged that wages are a mandatory subject of bargaining, and that generally an employer may as a means of exerting economic pressure unilaterally implement its proposals on mandatory subjects after impasse is reached. However, citing *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1982), the Board observed that the employer's exercise of its right to unilaterally

<sup>&</sup>lt;sup>3</sup> However, we disavow the judge's analysis to the extent that it relies on *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981); and *Manno Electric*, 321 NLRB 278 (1996). Those decisions are not applicable to cases in which a striker is discharged for alleged misconduct during a protected activity. See *E. W. Grobbel & Sons*, 322 NLRB 304 (1996), citing *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).

<sup>&</sup>lt;sup>4</sup> See Sunol Valley Golf & Recreation Co., 310 NLRB 357, 371 (1993) ("It is . . . settled law that where an economic strike is converted to an unfair labor practice strike the economic strikers become unfair labor practice strikers on the date of conversion. They are then entitled, on their unconditional offer to return to work, to immediate reinstatement unless they were permanently replaced prior to conversion. If they were permanently replaced prior to conversion, the employer is obligated to place them on a preferential hiring list and to reinstate them before any other persons are hired or on the departure of their preconversion replacements.") We have modified the judge's order to more clearly set forth the Respondent's reinstatement obligations with respect to all the former strikers who requested reinstatement. See Charles D. Bonanno Linen Service, 268 NLRB 552, 553–554 (1984), enfd. 782 F.2d 7 (1st Cir. 1986).

<sup>&</sup>lt;sup>5</sup> The legality of the impasse is not in dispute. The medical and dental insurance provisions were part of the Respondent's Welfare Benefits proposal. Although the Respondent notified the Union of its intent to implement the Welfare Benefits proposal effective March 24, the medical and dental provisions did not become effective until April 1.

implement its prior proposals upon impasse did not mean the termination of the bargaining process. The Board concluded that the ongoing bargaining process would be undermined if the employer was granted "carte blanche authority over wage increases (without limitation as to time, standards, criteria, or the [union's] agreement)." 321 NLRB at 1390-1391. The Board found that the employer's "ongoing ability to exercise its economic force in setting wage increases and the [union's] ongoing exclusion from negotiating them would not only directly impact on a key term and condition of employment and a primary basis for negotiations, but it would simultaneously disparage the [union] by showing, despite its resistance to the proposal, its incapacity to act as the employees' representative in setting terms and conditions of employment." 321 NLRB at 1391. The Board concluded that such a result was inherently destructive of the fundamental principles of collective bargaining, and, accordingly, that the employer's exclusion of the union from any meaningful bargaining as to the procedures and criteria governing the merit pay plan violated Section 8(a)(5).

Here, we find that the Respondent's health benefits proposal is akin to the employer's merit wage proposals in McClatchy. From the outset of bargaining, the Respondent proffered a proposal that reserved to it sole discretion "[d]uring the term of this Agreement" to "change the method and/or means for providing for the medical/hospital and the dental benefits, which includes, the plan design, the level of the benefits and the administration thereof, provided the change is applied on a Company-wide basis, the change is first discussed with the Union, and any deductibles and coinsurance limits for the medical/hospital benefit will not exceed [specified dollar amounts]." As in McClatchy, the Union objected to the proposal, and upon impasse, the Respondent announced its intention to implement, and in fact did implement, the proposal.

On its face, the proposal permits the Respondent to unilaterally change the provider, plan design, the level of benefits, and the administrator during the term of the contract so long as the change is companywide. Moreover, although the proposal calls for *discussions* with the Union about interim changes, Administrative Manager Dave Oechsner acknowledged that the Respondent did not intend to *negotiate* changes in the plan. He testified that the Respondent would have the last word. Indeed, on April 11, when the Respondent transmitted a list of changes in health insurance benefits to the Union, including increases in deductibles and out-of-pocket expenses, the changes were presented as a fait accompli. The Re-

spondent admittedly did not even discuss these matters with the Union beforehand.

Thus, like the merit pay proposal in *McClatchy*, the Respondent's health insurance proposal left no room for bargaining between the Union and the Respondent about the manner, method, and means of providing medical and dental benefits during the term of the contract. As in *McClatchy*, therefore, the proposal nullified the Union's authority to bargain over the existence and the terms of a key term and condition of employment.<sup>6</sup> Accordingly, as in *McClatchy*, we find that the Respondent's implementation of the proposal was inimical to the postimpasse, on-going collective-bargaining process, and violated Section 8(a)(5) of the Act.

#### **ORDER**

The National Labor Relations Board adopts the recommended order of the administrative law judge, as modified and set forth in full below and orders that the Respondent, KSM Industries, Inc., Germantown, Wisconsin, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Threatening employees with the loss of jobs and closure of the facility in retaliation for the employees' union activities.
- (b) Maintaining a proposal that replacement employees will not be terminated or displaced by striking employees
  - (c) Failing to accept and process a grievance.
- (d) Failing to timely furnish the Union on request with information that is necessary to the performance of the Union's statutory duties as the employees' exclusive collective-bargaining representative.
- (e) Unilaterally implementing the health insurance plan so as to undermine the status of the Union as the employees' exclusive collective-bargaining representative.
- (f) Failing and refusing to immediately reinstate unfair labor practice strikers to their former positions upon their unconditional offer to return to work.

<sup>&</sup>lt;sup>6</sup> We find no principled reason to distinguish this case from *McClatchy* on the basis that this case involves health insurance rather than wages. Like wages, health insurance is a mandatory subject of bargaining. See *Wire Products Mfg. Corp.*, 329 NLRB 155 (1999); and *Dynatron/Bondo Corp.*, 323 NLRB 1263 (1997). Further, like wages, it is considered an important term and condition of employment. See, e.g., *ABC Automotive Products Corp.*, 307 NLRB 248, 250 (1992), supplemented 319 NLRB 874 (1995) (finding that employer's announcement to striking employees of its intent to unilaterally institute its own health and welfare plan to replace the union's welfare fund "damag[ed] the bargaining relationship . . . by the message to employees that the Respondent was taking it on itself to set this important term and condition of employment, thereby 'emphasizing to the employees that there is no necessity for a collective bargaining agent)." [Citation omitted.]

- (g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All regular full-time and regular part-time production and maintenance employees, warehouse employees, shipping and receiving employees and stockroom employees, employed by the Respondent at its plant located at N115 W 19025 Edison Drive, Germantown, Wisconsin, and excluding the following: management and sales employees, tape production employees, office clerical employees, professional employees, confidential employees, guards and supervisors as defined in the Act.

- (b) Within 14 days from the date of this Order, upon and pursuant to the Union's application of October 5. 1997, on behalf of employees who participated in the strike which began on January 3, 1997 (except Randy Schultz), and who have not already been reinstated, offer full reinstatement to all such employees to their former positions or, if those positions no longer exist, to substantially equivalent positions, if available, without prejudice to their seniority or other rights and privileges, dismissing if necessary any persons hired as replacements on or after March 19, 1997. Place the remaining former strikers on a preferential hiring list in accordance with their seniority or other nondiscriminatory practices utilized by the Respondent and offer them employment before any other persons are hired or on the departure of any replacement hired before March 19, 1997.
- (c) Make whole the employees referred to in paragraph 2(b) above for any loss of earnings they may have suffered or may suffer by reason of the Respondent's refusal and failure to reinstate them, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).
- (d) On request of the Union, rescind the health insurance plan made effective on April 1, 1997, and reinstate the prior health insurance plan as to bargaining unit employees and make such employees whole for any losses they may have suffered as a result of the plan change, as provided in *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest.

- (e) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (f) Within 14 days after service by the Region, post at its facility in Germantown, Wisconsin, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 19, 1997.
- (g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.
- (h) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

#### MEMBER TRUESDALE, dissenting in part.

I agree with my colleagues in all aspects of their decision, except that, unlike them, I would adopt the judge's finding that Operations Manager Bill James did not violate Section 8(a)(1) when he asked strikers what they were doing for a living.

Striker Gordon Sabel testified that James commented, "These people in here have jobs. What are you doing for a livelihood." Sabel testified that James made "quite a few nasty remarks to all the picketers . . . like we needed to hear that." Striker Richard Kuhlenbeck testified that "[t]here were times that [James] would ask some of the

<sup>&</sup>lt;sup>7</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

people where or if they got a different job." Kuhlenbeck testified further that "most of the time people would not want to speak with Bill James," but that on occasion there was [sic] some people that did say something." He indicated that these exchanges between James and the strikers were part of a conversation.

The record reflects that James was contacted by other companies when strikers applied for work elsewhere. The judge credited James' testimony that during the strike he became aware of which companies were looking for employees with certain job skills, and that he would pass along this information to some of the pickets. In these circumstances, the judge found that Sabel and Kuhlenbeck's testimony did not establish that James made a threatening comment.

I agree with the judge. Although my colleagues and I have found certain of James' remarks on the picket line to violate Section 8(a)(1) of the Act, James' inquiry is not of the same nature. It was related directly to James' role as a reference for individuals seeking interim employment, and Kuhlenbeck's own testimony indicates that it was conversational not taunting. James' comment was a simple observation of the obvious fact that the strikers were not working but the legal replacements were working. James' inquiry, "What are you doing for a livelihood?" did not contain any promise of special benefit or constitute threat of discharge. *Coca Cola Bottling Co. of Louisville*, 166 NLRB 134, 135 (1967). Thus, contrary to my colleagues, I find that it did not have a reasonable tendency to coerce employees.

#### **APPENDIX**

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with the loss of jobs and closure of the facility in retaliation for your union activities.

WE WILL NOT maintain a proposal that replacement employees will not be terminated or displaced by striking employees.

WE WILL NOT fail to accept and process a grievance. WE WILL NOT fail to timely furnish the Union with requested information that is necessary to the performance of the Union's statutory duties as the employees' exclusive collective-bargaining representative.

WE WILL NOT unilaterally implement the health insurance plan so as to undermine the status of the Union as the employees' exclusive collective-bargaining representative.

WE WILL NOT fail and refuse to immediately reinstate unfair labor practice strikers to their former positions upon their unconditional offer to return to work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All regular full-time and regular part-time production and maintenance employees, warehouse employees, shipping and receiving employees and stockroom employees, employed by the Respondent at its plant located at N115 W 19025 Edison Drive, Germantown, Wisconsin, and excluding the following: management and sales employees, tape production employees, office clerical employees, professional employees, confidential employees, guards and supervisors as defined in the Act.

WE WILL, within 14 days from the date of this Order, upon and pursuant to the Union's application of October 5, 1997, on behalf of employees who participated in the strike which began on January 3, 1997 (except Randy Schultz), and who have not already been reinstated, offer full reinstatement to all such employees to their former positions or, if those positions no longer exist, to substantially equivalent positions, if available, without prejudice to their seniority or other rights and privileges, dismissing if necessary any persons hired as replacements on or after March 19, 1997, and WE WILL place the remaining former strikers on a preferential hiring list in accordance with their seniority or other nondiscriminatory practice utilized by us and offer them employment before any other persons are hired or on the departure of any replacement hired before March 19, 1997.

WE WILL make whole the employees referred to above for any loss of earnings they may have suffered or

may suffer by reason of the Respondent's refusal and failure to reinstate them, all of which is to be done in the manner set forth in the remedy section of the decision.

WE WILL, on request of the Union, rescind the health insurance plan made effective on April 1, 1997, and reinstate the prior health insurance plan.

WE WILL make the employees whole for any losses they may have suffered as a result of our unilateral implementation and change in our health insurance plan, with interest.

#### KSM INDUSTRIES, INC.

Paul Bosanac, Esq., for the General Counsel.Russ R. Muelle, r Esq., of Milwaukee, Wisconsin, for the Respondent.

Marianne Goldstein Robbins, Esq., of Milwaukee, Wisconsin, for the Charging Party.

#### DECISION

#### STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried in Milwaukee, Wisconsin, before me on January 12, 13, and 14, 1998, pursuant to a consolidated complaint and notice of hearing (the complaint) issued by the Regional Director for Region 30 of the National Labor Relations Board (the Board) on December 29, 1997. The complaint, based upon original and amended charges filed in Cases 30–CA–13762, 30–CA–14008, and 30–CA–14101 by United Paperworkers International Union, Local 7779, AFL–CIO–CLC (the Charging Party or Union), alleges that KSM Industries, Inc. (the Respondent or KSM), has engaged in certain violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Respondent's timely filed answer denies the commission of any unfair labor practices.

#### Issues

The complaint alleges that the Respondent engaged in independent violations of Section 8(a)(1) of the Act by threats to close its business, threats to employees that they will not get their jobs back and discouraging picketing employees from utilizing the Board processes, engaged in violations of Section 8(a)(1) and (3) of the Act by discharging the leading union adherent and failing and refusing to reinstate unfair labor practice strikers upon their unconditional offer to return to work, and engaged in striking employees, refusing to process a grievance and provide necessary and relevant information to the Union, and withdrawing on November 6, a proposal to grant an increase in wages in 1998 and 1999 by 35 cents each year.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

# FINDINGS OF FACT I. JURISDICTION

The Respondent, a corporation, with an office and a place of business in Germantown, Wisconsin, is engaged in the business of steel fabrication, where it annually purchased and received goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of Wisconsin. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### I. ALLEGED UNFAIR LABOR PRACTICES

#### A. Background

The Union has represented the respective employees of Respondent in an appropriate unit<sup>2</sup> as the exclusive collective-bargaining representative since about 1977. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from January 1, 1994, through December 31, 1996.

At all material times the pertinent KSM supervisors involved in this case are Administrative Manager Dave Oechsner and Operations Manager Bill James.

#### B. Bargaining in 1996

Negotiations for a successor agreement began on November 26, 1996, and on that date Oechsner presented an initial proposal for a 1997 labor agreement to the Union (R. Exh. 20). In part, proposal 14 included changes to the medical/hospital and dental plan (health insurance plan) that was in effect at the Respondent.<sup>3</sup>

The Respondent and the Union continued to discuss terms for a successor agreement in a number of negotiating sessions that took place in December 1996, but were unable to reach a consensus by the expiration of the parties' contract on December 31, 1996.

#### C. The Strike

On January 3, approximately 70 employees represented by the Union and employed at Respondent's facility, ceased work concertedly and engaged in a strike. They carried picket signs stating "UPIU Local 7779 on Strike" and regularly patrolled in the morning and the evening at the Respondent's Clinton Drive and Edison Street locations. The General Counsel concedes that

<sup>&</sup>lt;sup>1</sup> All dates are in 1997 unless otherwise indicated.

<sup>&</sup>lt;sup>2</sup> All regular full-time and regular part-time production and maintenance employees, warehouse employees, shipping and receiving employees and stockroom employees, employed by the Company at its plant located at N115 W19025 Edison Drive, Germantown, Wisconsin, and excluding the following: management and sales employees, tape production employees, office clerical employees, professional employees, confidential employees, guards and supervisors as defined in the Act.

<sup>&</sup>lt;sup>3</sup> Sec. 3(C) states: During the term of this Agreement and for cost containment purposes, the Company may change the method and/or means for providing for the medical/hospital and the dental benefits, which includes, the plan design, the level of the benefits and the administration thereof; provided, the change is applied on a Companywide basis and the change is first discussed with the Union.

the strike at its inception was an economic strike but asserts that it was subsequently converted to an unfair labor practice strike (this issue will be addressed later in the decision).

The Respondent made the decision to continue production activities during the strike. For this purpose, temporary employees were initially hired from local employment services and at the end of the first week, approximately 15 replacement employees were on the payroll. During the course of the strike, the Respondent hired additional temporary workers and a number of these temporary employees were offered and accepted permanent positions at KSM.

During the first part of the strike, January 3 to mid-March 1997, there was heavy picketing in both the morning and afternoon at the Clinton Drive and Edison Street locations. Additionally, a lot of violence took place including spitting at and pounding on the cars of replacement employees as they entered and exited the facility, throwing objects at cars, nails being placed and stuck in the pavement, people being threatened, and numerous racial slurs and vile language was uttered between striking and replacement employees. To reduce the frequency of these incidents, the Respondent organized a convoy of replacement employees' cars to enter and exit the facility together during the morning and afternoon shifts. Additionally, in the second week of January 1997, James commenced going to the picket line on a daily basis for the start of the morning and end of the afternoon shift. Between mid-March and June 1997, picketing continued in the same locations but at a reduced level and the amount of violence declined substantially. From June through October 5, the number of pickets dwindled and the violence was concentrated to one individual.

On February 5, a fight took place among a number of striking and replacement employees. The Germantown police were called and several of the replacement employees were issued citations for assault and disorderly conduct.<sup>4</sup> As a result of the February 5 incident, the Respondent instituted two defensive mechanisms. First, they installed in plain view, video surveillance cameras to capture future incidents of picket line misconduct and second, James began to carry a tape recorder with him when he regularly went to the picket line. Additionally, on February 7, the Respondent wrote a letter to the Union about picket line and strike misconduct,<sup>5</sup> and began to keep an incident log of striker misconduct (GC Exh. 18).

On the date of the subject hearing, none of the striking employees has been offered their job back at the Respondent.

#### D. Negotiations After the Strike

On January 16, the Respondent proffered the Union a "Final Strike Settlement for Terms of a Renewed Labor Contract" that

had to be ratified by January 19 (R. Exh. 21). Included in the proposal is language that the Respondent may change the method and/or means of providing for the employees medical/hospital and dental benefits. Additionally, the Respondent included language in the proposal that employees will be paid a signing bonus of \$700 and increases in straight time rates of pay will be made in 1998 and 1999 by 35 cents each year. The Union rejected the proposal.

On March 12, the Respondent provided the Union a proposal "For Terms of a Renewal Labor Contract and for Settlement of the Strike." Included in this proposal was the same language regarding the employees medical/hospital and dental benefits and increases in straight time rates of pay in 1998 and 1999 by 35 cents each year. The Respondent, however, withdrew the \$700 signing bonus. Also included for the first time among the March 12 contract proposals was the provision that, "Employees hired since the start of the strike, i.e., January 3, 1997, will be afforded continued employment and will not be terminated or displaced by employees who engaged in the strike, regardless of seniority." This provision has remained unchanged in all subsequent proposals given to the Union up to and including the date of the hearing.

Additional negotiation sessions took place on July 17 and August 25, followed by a series of meetings in September 1997. On September 8, the Union submitted a handwritten proposal agreeing to the Respondent's offer to increase rates of pay in 1998 and 1999 by 35 cents each year and proposing for the first time a \$500 Christmas bonus (GC Exh. 14). Additionally, the Union on September 22, submitted an offer to the Respondent to accept its January 16 "Strike Settlement Proposal and Renewal Labor Contract" with several noted exceptions (R. Exh. 28). Respondent countered with a proposed agreement dated September 23 to "End the Strike and Settlement Terms" (R. Exhs. 27(a) and (b)). The Union rejected the September 23 proposal.

On October 5, by a hand delivered letter to Oechsner, the Union agreed to terminate the strike and unconditionally offered to return to work (GC Exh. 15).

By letter dated November 6, the Respondent notified the Union that it was withdrawing its proposal to increase straight time rates of pay in 1998 and 1999 by 35 cents each year to be replaced by a proposal to increase wages in an amount to be negotiated effective the first day of the first full payroll period in November 1998 (GC Exh. 16).

Since November 6, there has been no additional negotiation sessions or exchange of proposals between the parties, and no successor collective-bargaining agreement has been finalized.

#### E. Respondent's Refusal to Process a Grievance and Provide Information

By letter dated March 13, the Respondent by Oechsner, notified striker Randy Schultz that effective March 12, his employment was terminated for engaging in picket line misconduct (this matter will be addressed later in the decision). On March 18, the Union filed a grievance concerning the discharge and on the same date, requested records of discipline including picket line activity that has been given to replacement workers during the strike. On March 19, Oechsner replied and stated in

<sup>&</sup>lt;sup>4</sup> Germantown police officers Thomas Schreihart and Jeffrey Schnell credibly testified that they were called to the KSM facility on approximately 10 occasions during the course of the strike to monitor allegations of strike misconduct and on a number of occasions issued citations to both strikers and replacement employees.

<sup>&</sup>lt;sup>5</sup> The letter stated: This is to advise, on behalf of KSM Industries, Inc., that picket line and strike misconduct engaged in by striking employees jeopardizes their continued employment with the company. Any decisions in this regard will be made at a time appropriate considering circumstances related thereto.

pertinent part, "The grievance will not be accepted or processed, since there is currently no effective Grievance and Arbitration procedure under which the grievance may be filed due to the expiration of the labor Agreement by its terms on and including December 31, 1996." By letter dated March 24, Oechsner requested the Union to explain why it needed the information. On April 4, the Union replied and explained to the Respondent that it needed the information to determine whether there is just cause for the termination of Schultz, and whether discipline has been applied to other employees in a disparate fashion (GC Exh. 11). By letter dated April 8, Oechsner reiterated that the Respondent will not accept or process the Schultz grievance due to the expiration of the labor agreement and therefore, will not respond to the request for information nor meet with the Union in an attempt to discuss the grievance.

#### F. Implementation of the Health Insurance Plan

As discussed above, the Respondent on November 26, 1996, offered among its contract proposals a health insurance provision that allowed KSM to have the final word during the term of the agreement and to unilaterally implement changes to the method and/or means for providing medical/hospital and dental benefits, including the plan design, the level of the benefits, and the administration thereof. By letter dated March 17, the Respondent notified the Union that it was declaring impasse and that it would take steps to implement the health insurance provision. On April 11, the Respondent notified the Union that the health insurance plan was being implemented retroactive to April 1 (GC Exh. 13).

## $G.\ Analysis$

#### 1. The 8(a)(1) violations

The General Counsel alleges in Case 30–CA–13762 that about January 11 Respondent's operations manager, Bill James, threatened employees on the picket line that they will not get their jobs back at KSM.

Roger Day, who was the union president in January 1997, testified that James stated to a number of employees on the picket line that, "probably you'll never get another job except for like in a convenience store." He further testified that James said, "that the pickets will never work in this kind of work again, will not get our jobs back, would never see the inside of the doors or the building no matter what, and the pickets would never return to work." James testified that employee and striker Dave Schneiderman, about January 1997, asked him in the presence of a number of pickets when the strike was going to be settled. James replied "that maybe you better see if that convenience store still has an opening" (before being hired by James at KSM for the second time, Schneiderman had worked as a night shift store manager in a convenience store). Employee Gordon Sabel, testified in response to the General Counsel's question of whether James said anything about employees getting their jobs back, that he heard James say things like, "you guys are out, you're not getting back in." Striker Richard Kuhlenbeck testified that James said "that we would not come back, that the ones that replaced us are their permanent workers."

The general test applied to determine whether employer statements violate Section 8(a)(1) of the Act is "whether the employer engaged in conduct which reasonably tends to interfere with, restrain, or coerce employees in the free exercise of rights under the Act." *NLRB v. Almet, Inc.*, 987 F.2d 445 (7th Cir. 1993); *Reeves Bros.*, 320 NLRB 1082 (1996).

I fully credit the testimony of Day, Sabel, and Kuhlenbeck and conclude that James' statements to the striking employees constitute threats that interfere with Section 7 rights, and violate Section 8(a)(1) of the Act. *Great Dane Trailers*, 293 NLRB 384, 389 (1989).

The General Counsel asserts that about January 24 James harassed picketing employees about their search for and/or about their interim employment.

Kuhlenbeck testified that James asked strikers on the picket line where they were working, and if they got different jobs. Sabel testified that James said, "These people in here have jobs. What are you doing for a livelihood?" James testified that May Steel sent a questionnaire to KSM about Roger Day who was hired by May Steel in January 1997, and inadvertently attached the back page of his employment application that showed Day applied for a job in December 1996, prior to the commencement of the strike on January 3. James credibly testified that KSM collectively decided to telephone May Steel representatives to determine whether they had a severance policy before they would hire an individual since at the time of Day's application, he was still an employee, held the position of president of the Union and the parties were still engaged in collectivebargaining negotiations to reach a new labor agreement. Additional testimony by James concerning this issue indicates that in the course of his job duties and during the strike, he became aware of which companies were looking for employees with certain job skills. He credibly testified that he would pass along this information to some of the pickets. He also testified that he was aware that KSM employees obtained employment at some of the companies that he mentioned to the striking employees while they both were on the picket line.

Under these circumstances, it cannot be established that the testimony of Kuhlenbeck or Sabel contains threatening remarks uttered by James or that James' statements and actions violate the Act. Therefore, I recommend that this portion of the complaint be dismissed.

The General Counsel also alleges that about late April and again during May 1997, James threatened employees on the picket line that the KSM facility would shutdown or close.

Employees Roger Day and Richard Kuhlenbeck testified that while they were on the picket line they heard James state in late April and early May 1997 "that the doors are closing now and KSM was going to close its doors so the employees did not have to worry about it."

James admitted that he told the striking employees that KSM was going to close the doors or its doors at least on three or four occasions but testified that it was in response to questions of the pickets and the statements were not made beyond the second week of February or after March 1997.

Contrary to James' testimony that he did not state to striking employees after March 1997 that the doors of KSM were closing, I find in agreement with the credible and independent testimony of Day and Kuhlenbeck that the same statements James admitted making in February and March 1997 were also made in April and May 1997. Such statements went beyond lawful predictions of the economic consequences of continued union representation supported by objective facts. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969); and *Rapid Armored Truck Corp.*, 281 NLRB 371, 383 (1986).

Under these circumstances, I find that such statements made by a responsible supervisor to striking employees, tends to restrain and coerce employees engaged in protected activity in violation of their Section 7 rights, and thereby violates Section 8(a)(1) of the Act.

Lastly, the General Counsel alleges that about July 3 James discouraged picketing 25 employees from utilizing the Board processes by announcing that all current charges had been lost.

Roger Day testified that James made a statement on the picket line that he heard from the Board that the Union lost all of the charges and the employees had nothing to worry about. Day testified that he blew it off but immediately called the union attorney to check whether this was true.

James testified that numerous unfair labor practice charges were filed by the Union and KSM had to wait for the Board to announce the results of the investigation. On one occasion, and in response to a question from one of the striking employees concerning when the parties were going to get together and negotiate, James replied "that if there were any hot button issues with the Board, they would have been back to KSM pretty fast."

I find that even if James made the statement attributed to him by Day, the Act has not been violated. In this regard, Day testified that he blew the statement off and also decided to check with the union attorney concerning the veracity of the statement. Moreover, the statement does not contain a threat and only reports what James allegedly heard. Further, the formal papers confirm that after July 3, both Day as union president and the Union as a legal entity filed amended charges in Case 30–CA–13762, and the Union filed the charges in Cases 30–CA–14008 and 30–CA–14101. Under these circumstances, neither Day or the Union were discouraged from utilizing the Board's processes. Lastly, it is noted that on August 25, the Board informed KSM that it found merit to the allegations in Case 30–CA–13762, concerning the unilateral implementation of the health insurance plan and the 8(a)(1) statements made by James

Accordingly, I recommend that this portion of the complaint be dismissed.

#### 2. The discharge of Randy Schultz

The General Counsel alleges that the Respondent discharged Randy Schultz about March 14, because he joined, supported, or assisted the Union and engaged in concerted activities. The Respondent takes the position that Schultz was terminated effective March 12, because he physically assaulted and verbally threatened a management official, was arrested for disorderly conduct by the Germantown police and for having engaged in other misconduct during the strike, such as pounding on cars of KSM personnel and verbally threatening another management representative.

The Respondent instituted two defensive mechanisms after a February 5 fight that took place among replacement and striking employees. First, the Respondent installed surveillance video cameras in plain view. Second, when James regularly went to observe the picket line at the start of the morning and at the end of the afternoon shift, he carried a small tape recorder in his clothing.

Employee Ronald Byrdsong credibly testified that he was initially hired as a temporary employee during the first week of the strike and became a permanent employee on March 9. During the first several weeks of the strike, he was driven to and from work by personnel of the temporary employment service. During the morning shift, Byrdsong testified that pickets would jump on top of the car, try to open the doorknobs, and constantly would utter profanity at the replacement employees in the employment service automobile. Specifically, Byrdsong testified that in January 1997 Randy Schultz pulled on the rear door of the employment service automobile, and in February 1997 when he started driving his own vehicle to work he observed Schultz kicking his car and spitting in his window. Byrdsong further testified that Schultz directed vile profanity and racial slurs at him. During this same time period, the Respondent commenced keeping an incident log of striker misconduct (GC Exh. 18). That log lists six incidents of misconduct undertaken by Schultz prior to his discharge on March 12, including profanity, verbal threats, hitting the side of a manager automobile, and pounding on replacement employees automobiles and hitting the driver side window of a manager's vehicle. On March 7, James taped a conversation with Schultz, which was played during the course of the hearing (R. Exh. 16) and is memorialized in a transcript (R. Exh. 15). The transcript and the tape confirm that Schultz hit the windows of replacement employees automobiles and used vile profanity at James and the replacement employees.<sup>6</sup> On March 12 James again tape recorded a conversation that took place between him and Schultz. The transcript indicates that James observed Schultz slap the side of a replacement employee vehicle as it exited Clinton Drive and that Schultz used some of the same vile language as was uttered on March 7. Additionally, James credibly testified and the surveillance camera video confirms, that Schultz hit James on the left shoulder hard enough that it knocked him off balance and his knees buckled (R. Exh. 14). Shortly after Schultz hit James, the Germantown police were summoned and James charged Schultz with assault. Officer Thomas Schreihart, the investigating officer, credibly testified and his report (R. Exh. 1) confirms that he listened to the audio tape, observed the VHS tape, and then took Schultz into custody for disorderly conduct. Schreihart's report specifically references the profanity used by Schultz and the fact that the VHS tape shows that Schultz is striking James on James' left shoulder and the force of the blow caused James to take a step in order to gain his balance. Lastly, Schreihart testified that when he was summoned to the KSM facility prior to March 12, that Schultz was belligerent and was one of the bigger problems

<sup>&</sup>lt;sup>6</sup> Some of the language used by Schultz included: "I'm going to slap your fucking face, you son-of-a-bitch," "Fat fucking faggot," and "You stinking son-of-a-bitching faggot, sister fucking faggot."

out there. He personally heard Schultz utter vulgarities to the replacement employees. Likewise, Officer Jeffrey Schnell testified that he was the backup officer on March 12, and the Schreihart report is an accurate description of what occurred on that date. He also credibly testified that Schultz caused more problems, on the 10 to 15 responses that he made to KSM during the strike, than any other striker.

On March 12, Schultz told Officer Schreihart that he did not strike James but merely tapped him on the shoulder in order to get his attention. Schultz did tell Schreihart, however, that he was upset and was yelling at James. During his testimony, Schultz acknowledged that he probably directed profanity at James on March 12, but denied that prior to March 12 he ever banged on cars or used vile language. This representation is not supported by the record evidence and I reject Schultz' testimony to this effect. Indeed, there is overwhelming evidence in the record that Schultz engaged in repeated episodes of banging on and spitting at cars and using vile and profane language prior to March 12.

In Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's Wright Line test in NLRB v. Transportation Management Corp., 462 U.S. 393, 399-403 (1993). In Manno Electric, 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

For the following reasons, I find that the General Counsel has not made a strong showing that the Respondent was motivated by antiunion consideration in discharging Schultz. Even if this was not the case, I find that the Respondent would have taken the same action even if the employee had engaged in protected activity.

In Clear Pine Mouldings, 268 NLRB 1044 (1984), enfd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986), the Board held that strike misconduct is disqualifying if, under all the circumstances, it reasonably tends to coerce or intimidate other employees. Here, there is compelling evidence that Schultz, prior to March 12, engaged in strike misconduct including pounding on and spitting at vehicles, uttering vile profanity and racial slurs and on the date of his discharge continued to engage in the same type of conduct while committing a physical assault upon James for which he was arrested for disorderly conduct. As the Board held in Clear Pine Mouldings, conduct such as kicking, slapping, and throwing beer cans at moving vehicles is intimidating enough in and of itself without

being accompanied by additional threats or a "threatening or violent demeanor." In the subject case, not only do we have kicking, slapping, and spitting, but the evidence is conclusive that Schultz engaged in a physical assault on a management representative and participated in repeated episodes of vile language and vulgarities directed at managers and replacement employees.

Under these circumstances, it raises to the level of violent conduct which may reasonably tend to coerce or intimidate employees in the exercise of their rights protected under the Act.

Accordingly, I conclude that Schultz was terminated for engaging in strike misconduct and was not terminated for engaging in protected concerted activities. Therefore, he is not entitled to reinstatement, and I recommend that the allegations in the complaint alleging that the Respondent violated Section 8(a)(1) and (3) of the Act when it discharged Schultz on March 12, be dismissed.

#### 3. The March 12, 1997 contract proposal

The General Counsel alleges in complaint Case 30–CA–4008 that the Respondent's provision among its contract proposals on March 12 that states, "Employees hired since the start of the strike, i.e., January 3, 1997, will be afforded continued employment and will not be terminated or displaced by employees who engaged in the strike, regardless of seniority," and its continued maintenance of said provision in subsequent contract proposals, is a failure and refusal to bargain in good faith in violation of Section 8(a)(1) and (5) of the Act.

Because the law prohibits the permanent replacement of unfair labor practice strikers and the removal of replacement employees, if necessary, and the above provision does not adequately address or explain that issue, I find that the Respondent's continued reliance on the provision violates the Act. Storer Communications, 294 NLRB 1056, 1093 (1989); Consolidation Coal Co., 266 NLRB 670, 672 (1983).

Accordingly, since the Respondent has maintained the provision described above at all material times since March 12, it has violated Section 8(a)(1) and (5) of the Act.

## 4. The refusal to process a grievance and provide information

The General Counsel alleges in complaint Case 30–CA–3762 that the Respondent refused to accept or process grievances that arose after the parties' collective-bargaining agreement expired and refused to provide necessary and relevant information to the Union.

By letter dated March 13, the Respondent by Oechsner, notified striker Randy Schultz that effective March 12, his employment was terminated for engaging in picket line misconduct. On March 18, the Union filed a grievance concerning the discharge and on the same date, requested records of discipline including picket line activity that has been given to replacement workers during the strike. On March 19, Oechsner replied and stated in pertinent part, "The grievance will not be accepted or processed, since there is currently no effective Grievance and Arbitration procedure under which the grievance may be filed due to the expiration of the labor Agreement by its terms on

and including December 31, 1996." By letter dated March 24, Oechsner requested the Union to explain why it needed the information. On April 4, the Union replied and explained to the Respondent that it needed the information to determine whether there is just cause for the termination of Schultz and whether discipline has been applied to other employees in a disparate fashion (GC Exh. 11). By letter dated April 8, Oechsner reiterated that the Respondent will not accept or process the Schultz grievance due to the expiration of the labor agreement and therefore, will not respond to the request for information nor meet with the Union in an attempt to discuss the grievance.

As a general rule, parties to a collective-bargaining relationship have a continuing statutory obligation to adhere to established grievance procedures even after the expiration of a contract. Bethelem Steel Co., 136 NLRB 1500 (1962), enfd. in pertinent part 320 F.2d 615 (3d Cir. 1963); Indiana & Michigan Electric Co., 284 NLRB 53, 54–55 (1987). In certain limited circumstances, however, the pendency of unfair labor practice charges may present a defense to a refusal to bargain about grievances involving the same allegations made in those charges. Airport Aviation Services, 292 NLRB 823, 830 (1989).

Unlike the situation in that case, there were no unfair labor practice charges pending when the Respondent rejected the grievance and refused to provide information. It was not until April 9, that the Union filed a charge in Case 30–CA–13762 which alleged, inter alia, that the Respondent refused to process the Schultz grievance and provide necessary information.

With respect to the request for information, I find that the Union's April 4 explanation to the Respondent that it needed the records of discipline given to replacement workers during the strike to determine whether KSM has applied discipline in a disparate fashion, to be a legitimate and proper request. *Page Litho, Inc.*, 311 NLRB 881, 891 (1993).

Under these circumstances, I conclude that by refusing to process the Schultz grievance and to provide relevant and necessary information to the Union, Respondent violated Section 8(a)(1) and (5) of the Act. Genstar Stone Products, 317 NLRB 1293, 1300 (1995).

## 5. Implementation of the health insurance plan

The General Counsel alleges in complaint Case 30–CA–13762 that the Respondent's unilateral implementation of its health insurance plan on April 1, violates Section 8(a)(1) and (5) of the Act. The Respondent, on November 26, 1996, offered among its contract proposals a health insurance provision that allowed KSM to have the final word during the term of the agreement and to unilaterally implement changes to the method and/or means for providing medical/hospital and dental benefits, including the plan design, the level of the benefits and the

administration thereof. By letter dated March 17, the Respondent notified the Union that it was declaring impasse and that it would take steps to implement the health insurance provision. On April 11, the Respondent notified the Union that the health insurance plan was being implemented retroactive to April 1 (GC Exh. 13).

The General Counsel does not dispute that KSM was free to insist to impasse on the health insurance plan which allowed it the discretion to change the plan at will, but asserts that KSM was not privileged to proceed with implementing the health plan retroactive to April 1.

Although the Board has not addressed the precise issue presented here (postimpasse implementation of a health insurance plan), it has considered a similar matter and found an employer committed an unfair labor practice by unilaterally implementing a discretionary merit pay proposal, even though the employer had bargained to impasse over the proposal with the union. *McClatchy Newspapers*, 299 NLRB 1045 (1990), enfd. denied 964 F. 2d 1153 (D.C. Cir. 1992). On remand, the Board again found a violation, but on a different theory. *McClatchy Newspapers*, 321 NLRB 1386 (1996) (*McClatchy II*), enfd. 131 F.3d 1026 (D.C. Cir. 1997).

The General Counsel argued in the first McClatchy case that because the Employer had a statutory obligation to bargain over "wages, hours, and terms of employment," granting individual raises without consulting the union violated the Act. The Employer, as does KSM in the subject case, maintained that it had satisfied that duty by bargaining to impasse. Once it had exhausted the bargaining process by reaching impasse, the Employer asserted, it was privileged to implement its "last best, and final offer" over the union's objection. Relying on its decision in Colorado-Ute Electric Assn., 295 NLRB 607 (1989), enfd. denied 939 F.2d 1392 (10th Cir. 1991), the Board rejected the Employer's defense. In the Board's view, an employer who proposes unlimited management discretion over wages is really proposing that the union waive its statutory right to be consulted about wage changes. Therefore, the unilateral granting of merit increases, without obtaining the union's consent and bargaining in good faith, is an unfair labor practice.

On remand from the D.C. Circuit, the Board in *McClatchy II*, fashioned an exception to the implementation after impasse doctrine. It grounded its new "narrow exception" on the impact that implementation would have on the collective-bargaining process:

Were we to allow the Respondent here to implement its merit, wage increase and thereafter to expect to resume negotiations for a new collective-bargaining agreement, it is apparent that dun g the subsequent negotiations the Guild would be unable to bargain knowledgeably and thus have any impact on the present determination of unit employee wage rates. The Guild also would be unable to explain to its represented employees how any intervening changes in wages were formulated, given the Respondent's retention of discretion over all aspects of these increases.

<sup>&</sup>lt;sup>7</sup> Although the Respondent argues that it accepted and processed the Union's vacation pay grievance in October 1997, and therefore did process grievances under the expired collective-bargaining agreement, I find that such an argument is misplaced (R. Exhs. 22, 23, and 24). In that situation, although the grievance was filed in October 1997, it alleged a refusal to pay vacation pay for the period of 1996, a time when the parties' 1994–1996 collective-bargaining agreement was in full force and effect. Here, the Respondent steadfastly refused to meet and process the March 18 grievance concerning the Schultz discharge.

It is noted that neither the Supreme Court nor the Board has ever held that the statute mandates such a rule permitting postimpasse implementation. The Board has held, however, that exceptions to the postimpasse rule have been recognized for proposals on dues checkoff, union security, arbitration, and strikes.

Turning to the subject case, the health insurance provision allows KSM to have the final word during the term of the agreement and to unilaterally implement changes to the method and/or means for providing medical/hospital and dental benefits, including the plan design, the level of the benefits and the administration thereof (the Respondent's final modifications to the health insurance plan involve increase costs to employees). I find this provision precludes the Union from engaging in any meaningful bargaining, notwithstanding the proviso that KSM would first discuss proposed changes with the Union, since KSM by its terms could unilaterally implement any such changes if no agreement is reached. This was confirmed by Dave Oechsner, who admitted that the term "discuss" is not the same as "negotiate," and KSM could implement changes to the health insurance plan after exhaustive discussions without obtaining the consent of the Union. See also Loral Defense Systems-Akron, 320 NLRB 755 (1996), wherein the Board discusses the unilateral implementation and change in health care plans.

It is apparent that the Board has determined that wages are typically of paramount importance in collective bargaining and are expected to be set bilaterally. I am of the opinion that health insurance benefits today are of no less importance in the collective-bargaining process and must be set bilaterally in a collective-bargaining relationship. The subject matter of health insurance and the unfettered discretion retained by KSM, its reservation of the right not only to unilaterally implement changes to the method and/or means for providing medical/hospital and dental benefits but also to set the plan design, the level of benefits, and the plan's administration, without objective criteria, all set this case apart, as the Board found in regard to merit pay raises, from the vast majority of cases in which the employer seeks to implement proposals upon impasse.

Under these circumstances, and in agreement with the General Counsel that the unilateral implementation of the health insurance plan precluded the Union from engaging in any meaningful bargaining, I conclude that the Respondent has failed and refused to bargain in good faith with the Union in violation of Section 8(a)(1) and (5) of the Act.

## 6. Withdrawal of the wage increases

The General Counsel in complaint Case 30–CA–14101 alleges that Respondent's unilateral withdrawal, on November 6, of its proposal to increase wages in 1998 and 1999 by 35 cents each year was undertaken to avoid reaching agreement with the Union and constituted unlawful regressive bargaining in violation of Section 8(a)(1) and (5) of the Act.

There is no dispute that on March 12, Respondent offered among its contract proposals to increase wages in 1998 and 1999 by 35 cents each year. During that negotiation session, the Respondent informed the Union that they believed their job system classification rates were on the high side, were uncom-

petitive and they did not want to add further wage increases for 1997 on top of that. Accordingly, that was the reason the Respondent proposed a \$700 signing bonus in its January 16, strike settlement proposal, which was thereafter withdrawn on March 12, due to the Union's rejection of the proposal. Likewise, there is no dispute that the Respondent's proposal to increase wages in 1998 and 1999 by 35 cents each year remained in all subsequent proposals given to the Union up to November 6. On that date, the Respondent sent a letter to the Union withdrawing the proposal to increase wages and substituted a proposal to negotiate wages with the Union in 1998.

The General Counsel argues that the timing of this proposal, approximately 1 month after the Union unconditionally offered to return to work, was undertaken in bad faith to avoid reaching an agreement with the Union and constituted unlawful regressive bargaining.

The evidence discloses that the parties continued to negotiate, admittedly less frequently, up to September 23, when the Respondent proposed an agreement to terminate the strike and settle the underlying matter. This proposal was rejected by the Union.

On September 8, the Union submitted a handwritten proposal to the Respondent which provided for no wage increase in 1997, but contained wage increases in 1998 and 1999 of 35 cents each year. Also included in this proposal was a Christmas bonus of \$500. Thereafter, on September 22, the Union submitted a second handwritten proposal which in part included the same provisions regarding wage increases and the Christmas bonus. Thereafter, the Union made an unconditional offer to return to work on October 5.

The General Counsel opines that the November 6 withdrawal of the wage increases for 1998 and 1999 of 35 cents each year was undertaken in bad faith and to avoid reaching agreement with the Union. However, it did not introduce any substantive evidence to support these assertions. I am not inclined to accept this argument for a number of reasons. First, it is noted that the Union was apprised on March 12 that their job system classification rates were on the high side and that is why the signing bonus was initially proposed on January 16, rather then a wage increase for 1997. Second, it is noted that the parties continued to engage in wage negotiations on September 8 and 22, with the Union proposing a Christmas bonus for the first time. Third, on November 6, the Respondent offered to continue to negotiate in order to reach an agreement to increase wages in an amount effective the first day of the first payroll period in November 1998, and explained that further increases needed to be restrained due to job classification rates of pay being on the high side. Lastly, the Board stated in Eltec Corp., 286 NLRB 890 (1987), that if an employer's economic power increases through the successful weathering of a strike, it is not unlawful for the employer to use its new-found strength to secure contract terms that it deems beneficial.

Under these circumstances, I find that the Respondent engaged in nothing more then hard bargaining and was privileged to withdraw its wage proposal on November 6, just as the Union was free to add the Christmas bonus proposal during the September 8 negotiations. Further, it is noted that on November

6, the Respondent agreed to negotiate about this issue and other outstanding proposals that existed between the parties.

Accordingly, I recommend that the allegations in the complaint alleging that the Respondent withdrew its wage proposals on November 6, in bad faith and to avoid reaching an agreement in violation of Section 8(a)(1) and (5) of the Act, be dismissed.

#### 7. The strike

A strike which is motivated or prolonged, even in part, by an Employer's unfair labor practices is an unfair labor practice strike. *C-Line Express*, 292 NLRB 638 (1989); *Tall Pines Inn*, 268 NLRB 1392, 1411 (1984). In the subject case, on March 12, Respondent offered among its contract proposals the provision that, "Employees hired since the start of the strike, i.e., January 3, 1997, will be afforded continued employment and will not be terminated or displaced by employees who engaged in the strike, regardless of seniority." Respondent has maintained this proposal at all material times throughout negotiations, and therefore violated Section 8(a) (1) and (5) of the Act.

On March 18, the Union submitted a grievance to Respondent concerning the Schultz discharge. By letters dated March 19 and April 8, the Respondent refused to accept or process the grievance. On March 18, the Union requested Respondent to furnish it with records of discipline that were given to replacement workers during the strike. By letter dated March 24, the Respondent refused to furnish the requested information. Shortly after the receipt of the Respondent's letters refusing to process the grievance and provide information, the Union changed it picket signs to read, "Local 7779-Unfair Labor Practices, Failure to Process Grievances." As I previously found, the refusal to process the Schultz grievance and provide information violated Section 8(a)(1) and (5) of the Act.

On April 1, the Respondent again violated Section 8(a)(1) and (5) of the Act when it unilaterally implemented the health insurance plan without obtaining the consent of the Union.

Accordingly, I find that while the subject strike initially commenced on January 3 as an economic strike, the unfair labor practices committed by Respondent in March and April 1997, converted the strike to an unfair labor practice strike. I also find that the failure to process the Schultz grievance and timely furnish information about discipline of replacement strikers in addition to the unilateral implementation of the health insurance plan on April 1, contributed to the prolongation of the strike.

#### 8. The failure to reinstate unfair labor practice strikers

As unfair labor practice strikers, Respondent's striking employees were entitled to immediate reinstatement upon their unconditional application. *Laidlaw Corp.*, 171 NLRB 1366, 1368 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). This is so even if so-called permanent re-

placements have been hired to fill their jobs and must be terminated to make room for them.

I find that the Union's letter of October 5, was an unconditional offer to return to work immediately. Accordingly, I find that by failing to reinstate the striking employees, except Schultz, upon the Union's October 5 unconditional offer to return to work, Respondent has violated Section 8(a)(1) and (3) of the Act.

#### CONCLUSIONS OF LAW

- 1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. By offering and continuing to maintain a proposal that replacement employees will not be terminated or displaced by striking employees, by its failure to accept and process a grievance or to timely furnish the Union the information it requested, and by unilaterally implementing its health insurance plan, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.
- 4. The strike that began on January 3, 1997, was converted to an unfair labor practice strike on March 12, 1997.
- 5. By threatening employees with the loss of jobs and by telling them the doors were closing, the Respondent violated Section 8(a)(1) of the Act.
- 6. By failing and refusing to immediately reinstate unfair labor strikers to their former positions upon their unconditional offer to return to work, Respondent has violated Section 8(a)(1) and (3) of the Act.
  - 7. All other allegations have not been substantiated.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent unlawfully failed and refused to reinstate the unfair labor practice strikers upon their unconditional offer to return to work, I shall recommend that the Respondent be required to reinstate them, except Randy Schultz, immediately to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, to all strikers whose jobs were not filled by permanent replacements on or before March 12, 1997, dismissing if necessary any persons hired after that date, and make the strikers whole for any loss of earnings and other benefits suffered as a result of the Respondent's refusal to reinstate them from the date of their offer to return to work. Backpay is to be computed in the manner prescribed in F. W. Woolworth Co., 90 NLRB 289 (1950), with interest to be computed in accordance with New Horizons for the Retarded, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

<sup>&</sup>lt;sup>8</sup> Since the Respondent's first unfair labor practice was committed on March 12, by maintaining its proposal regarding the reinstatement rights of striking employees, I will use that date for the conversion of the strike to an unfair labor practice strike.